

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

GARY A. FRY,)	
)	No. CV-05-0269-MWL
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR AN
JO ANNE B. BARNHART,)	IMMEDIATE AWARD OF BENEFITS
Commissioner of Social)	
Security,)	
)	
Defendant.)	

BEFORE THE COURT is Plaintiff's motion for summary judgment (Ct. Rec. 11) and Defendant's motion to remand (Ct. Rec. 19), noted for hearing without oral argument on May 8, 2006 (Ct. Rec. 18). Plaintiff Gary A. Fry ("Plaintiff") filed a reply brief on May 1, 2006. (Ct. Rec. 21). Attorney Kenneth L. Isserlis represents Plaintiff; Special Assistant United States Attorney Nancy Mishalanie represents the Commissioner of Social Security ("Commissioner"). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's Motion for Summary Judgment (Ct. Rec. 11) and remands for an immediate award of benefits. The Court **DENIES** Defendant's Motion to Remand. (Ct. Rec. 19).

JURISDICTION

On May 22, 2001, Plaintiff protectively filed an application for Disability Insurance Benefits ("DIB"). (Administrative Record ("AR") 91). Plaintiff also filed for benefits on March 5, 2001. (AR 88-90). However, his March 5, 2001 claim was denied initially and on reconsideration, and Plaintiff did not appeal the reconsideration denial. (Ct. Rec. 12, p. 11). Although Plaintiff requested that this earlier claim be reopened and approved, the Administrative Law Judge ("ALJ") assigned to the case ultimately denied the request. (Ct. Rec. 12, p. 11; AR 36, 463-465). Plaintiff now requests that, on remand, an ALJ be ordered to reconsider his request to reopen his March 5, 2001 claim. (Ct. Rec. 12, pp. 30-32; Ct. Rec. 21, p. 15). However, this Court finds no justification for the reopening of Plaintiff's prior claim and declines to order a new ALJ, on remand, to reconsider Plaintiff's request to reopen his earlier claim. The remand of this case shall therefore pertain only to Plaintiff's May 22, 2001 application which was properly appealed following its denial on reconsideration.

Plaintiff's May 22, 2001 application (AR 91-94) was denied initially and on reconsideration. On June 24, 2004, Plaintiff appeared before ALJ R.J. Payne, at which time testimony was taken from Plaintiff and medical expert Arthur B. Craig, M.D. (AR 458-504). A supplemental hearing was held on September 17, 2004, at which time vocational expert Deborah LaPoint gave testimony. (AR 505-517). On October 6, 2004, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 29-36). The Appeals Council denied a request for review on July 12, 2005. (AR 21-23).

1 Therefore, the ALJ's decision became the final decision of the
2 Commissioner, which is appealable to the district court pursuant
3 to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial
4 review pursuant to 42 U.S.C. § 405(g) on September 6, 2005. (Ct.
5 Rec. 1).

6 STATEMENT OF FACTS

7 The facts have been presented in the administrative hearing
8 transcript, the ALJ's decision, the briefs of both Plaintiff and
9 the Commissioner and will only be summarized here.

10 Plaintiff was 61 years old on the date of the ALJ's decision.
11 (AR 30). His educational background includes four or more years
12 of college (AR 30, 114), and his past relevant work consists of 25
13 years as an elementary school teacher (AR 30, 487). Plaintiff
14 alleges disability since June 8, 2000, due to depression, an
15 inability to make decisions, confusion, pain in sternum, digestive
16 problems, inability to sleep, shortness of breath and upper body
17 problems. (AR 91-94, 126).

18 SEQUENTIAL EVALUATION PROCESS

19 The Social Security Act (the "Act") defines "disability" as
20 the "inability to engage in any substantial gainful activity by
21 reason of any medically determinable physical or mental impairment
22 which can be expected to result in death or which has lasted or
23 can be expected to last for a continuous period of not less than
24 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
25 Act also provides that a Plaintiff shall be determined to be under
26 a disability only if any impairments are of such severity that a
27 Plaintiff is not only unable to do previous work but cannot,
28 considering Plaintiff's age, education and work experiences,

1 engage in any other substantial gainful work which exists in the
2 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
3 Thus, the definition of disability consists of both medical and
4 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
5 (9th Cir. 2001).

6 The Commissioner has established a five-step sequential
7 evaluation process for determining whether a person is disabled.
8 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
9 is engaged in substantial gainful activities. If so, benefits are
10 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
11 not, the decision maker proceeds to step two, which determines
12 whether Plaintiff has a medically severe impairment or combination
13 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),
14 416.920(a)(4)(ii).

15 If Plaintiff does not have a severe impairment or combination
16 of impairments, the disability claim is denied. If the impairment
17 is severe, the evaluation proceeds to the third step, which
18 compares Plaintiff's impairment with a number of listed
19 impairments acknowledged by the Commissioner to be so severe as to
20 preclude substantial gainful activity. 20 C.F.R. §§
21 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
22 App. 1. If the impairment meets or equals one of the listed
23 impairments, Plaintiff is conclusively presumed to be disabled.
24 If the impairment is not one conclusively presumed to be
25 disabling, the evaluation proceeds to the fourth step, which
26 determines whether the impairment prevents Plaintiff from
27 performing work which was performed in the past. If a Plaintiff
28 is able to perform previous work, that Plaintiff is deemed not

1 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
2 At this step, Plaintiff's residual functional capacity ("RFC")
3 assessment is considered. If Plaintiff cannot perform this work,
4 the fifth and final step in the process determines whether
5 Plaintiff is able to perform other work in the national economy in
6 view of Plaintiff's residual functional capacity, age, education
7 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
8 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

9 The initial burden of proof rests upon Plaintiff to establish
10 a *prima facie* case of entitlement to disability benefits.
11 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
12 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
13 met once Plaintiff establishes that a physical or mental
14 impairment prevents the performance of previous work. The burden
15 then shifts, at step five, to the Commissioner to show that (1)
16 Plaintiff can perform other substantial gainful activity and (2) a
17 "significant number of jobs exist in the national economy" which
18 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
19 Cir. 1984).

20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a
22 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
23 the Commissioner's decision, made through an ALJ, when the
24 determination is not based on legal error and is supported by
25 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995
26 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
27 1999). "The [Commissioner's] determination that a plaintiff is
28 not disabled will be upheld if the findings of fact are supported

1 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
2 (9th Cir. 1983) (*citing* 42 U.S.C. § 405(g)). Substantial evidence
3 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
4 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
5 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
6 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
7 573, 576 (9th Cir. 1988). Substantial evidence "means such
8 evidence as a reasonable mind might accept as adequate to support
9 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
10 (citations omitted). "[S]uch inferences and conclusions as the
11 [Commissioner] may reasonably draw from the evidence" will also be
12 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965).
13 On review, the Court considers the record as a whole, not just the
14 evidence supporting the decision of the Commissioner. *Weetman v.*
15 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (*quoting Kornock v.*
16 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

17 It is the role of the trier of fact, not this Court, to
18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
19 evidence supports more than one rational interpretation, the Court
20 may not substitute its judgment for that of the Commissioner.
21 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
22 (9th Cir. 1984). Nevertheless, a decision supported by
23 substantial evidence will still be set aside if the proper legal
24 standards were not applied in weighing the evidence and making the
25 decision. *Browner v. Secretary of Health and Human Services*, 839
26 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
27 evidence to support the administrative findings, or if there is
28 conflicting evidence that will support a finding of either

1 disability or nondisability, the finding of the Commissioner is
2 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
3 1987).

4 **ALJ'S FINDINGS**

5 The ALJ found at step one that Plaintiff has not engaged in
6 substantial gainful activity since 1993. (AR 30). At step two,
7 the ALJ found that Plaintiff was diagnosed with atherosclerotic
8 heart disease in June of 2000 and underwent bypass grafting
9 surgery, has a history of hypersomnia with sleep apnea, has a
10 recurrent depressive disorder and has hypercholesterolemia,
11 impairments considered severe, but that he does not have an
12 impairment or combination of impairments listed in or medically
13 equal to one of the Listings impairments. (AR 31-32, 34-35).

14 The ALJ concluded that Plaintiff has the RFC to perform a
15 wide range of light exertion work. (AR 33). He specifically
16 found that, prior to June of 2000, Plaintiff, at two-hour
17 intervals, could sit, stand and walk for six hours, could lift up
18 to 20 pounds occasionally and 10 pounds frequently, could not work
19 at unprotected heights or around machinery, and, although he
20 requires medication for his medical condition, retains the ability
21 to be/remain responsive and attentive and carry out normal work
22 activities. (AR 33). The ALJ found that there was insufficient
23 evidence in which to evaluate any medically indicated
24 psychiatric/psychological conditions and noted no psychological
25 limitations stemming from any assessed mental impairments. (AR
26 33).

27 At step four of the sequential evaluation process, the ALJ
28 found that Plaintiff retained the RFC to perform his past relevant

1 work as a school teacher prior to the expiration of his insured
2 status. (AR 34). The ALJ also noted that, given the highly
3 transferable work skills within the educational/academic field,
4 vocational evidence indicated that Plaintiff would also be capable
5 of performing similar jobs such as a teacher's aide (assisting
6 teacher's aide and instructional teacher's aide). (AR 34-35).
7 Accordingly, the ALJ determined at step four of the sequential
8 evaluation process that Plaintiff was not disabled within the
9 meaning of the Social Security Act. (AR 34-36).

10 ISSUES

11 Plaintiff contends that the Commissioner erred as a matter of
12 law. Specifically, he argues that (1) the ALJ erred by rejecting
13 the opinion of his long-time treating physician, Jeffery B. Clode,
14 M.D.; and (2) the ALJ's opinion that Plaintiff is not fully
15 credible is erroneous and not properly supported.

16 The Commissioner asserts that this Court should remand this
17 case for further proceedings because there are unresolved issues
18 and the record does not require a finding of disability. (Ct.
19 Rec. 20, p. 6). Specifically, the Commissioner asserts that
20 outstanding issues must be resolved prior to a disability
21 determination, including addressing Plaintiff's mental condition,
22 further evaluating Plaintiff's RFC, and further evaluating
23 Plaintiff's subjective complaints. (Ct. Rec. 20, pp. 6-7). The
24 Commissioner concedes that the ALJ erred by failing to properly
25 evaluate the medical evidence of record and by failing to properly
26 evaluate Plaintiff's credibility, but asserts that the testimony
27 and evidence of Plaintiff and Plaintiff's treating physician
28 should not be credited as a matter of law. (Ct. Rec. 20).

DISCUSSION

A. Plaintiff's Credibility

Plaintiff argues that the ALJ erred by failing to present clear and convincing reasons for rejecting his testimony. (Ct. Rec. 12, pp. 25-27). The Commissioner agrees that Plaintiff's subjective complaints need to be reevaluated, but argues that Plaintiff's credibility is unresolved; thus, his testimony should not be credited as true. (Ct. Rec. 20, pp. 8-9).

It is the province of the ALJ to make credibility determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). However, the ALJ's findings must be supported by specific cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Once the claimant produces medical evidence of an underlying impairment, the ALJ may not discredit his testimony as to the severity of an impairment because it is unsupported by medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998) (citation omitted). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient: rather the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993). Plaintiff presented objective evidence of an impairment and there is no evidence of malingering indicated; therefore, the ALJ was required to give clear and convincing reasons for rejecting any testimony he did not adopt.

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1 The ALJ concluded that Plaintiff's subjective allegations of
2 total disability prior to June 2000 are not supported by the
3 evidence or his own reports of record during that period. (AR
4 33). The ALJ discounted Plaintiff's credibility based on the
5 medical evidence of record which the ALJ reported "does not
6 demonstrate or support a finding of 'total' disability prior to
7 June 2000." (AR 33).

8 The "fact that a claimant's testimony is not fully
9 corroborated by the objective medical findings, in and or itself,
10 is not a clear and convincing reason for rejecting it." *Vertigan*
11 *v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). Accordingly, as
12 recognized by both parties, the ALJ's rationale for rejecting
13 Plaintiff's testimony was not, by law, clear and convincing.
14 Moreover, "the ALJ must identify what testimony is not credible
15 and what evidence undermines the claimant's complaints." *Lester*,
16 81 F.3d at 834. The ALJ further failed to specifically identify
17 what evidence undermined Plaintiff's testimony and did not
18 indicate what specific evidence supported his conclusion that
19 Plaintiff was not fully credible.

20 In this case, the ALJ clearly failed to give specific "clear
21 and convincing" reasons, as required by the law, for rejecting
22 Plaintiff's testimony. The undersigned judicial officer therefore
23 concludes that Plaintiff's testimony was not rejected on
24 permissible grounds. *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
25 (9th Cir. 1991); 20 C.F.R. §404.1529 (1993). If the
26 Commissioner's reasons for disbelieving subjective testimony are
27 inadequate, the Commissioner is deemed to have accepted the

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1 testimony as true as a matter of law. *Varney v. Secretary*, 859
2 F.2d 1396, 1400 (9th Cir. 1988). Accordingly, the undersigned
3 shall credit Plaintiff's testimony in this matter.

4 Plaintiff testified at the administrative hearing held on
5 June 24, 2004, that two weeks following the heart procedure, in
6 June of 2000, walking and exercising were difficult and sitting
7 was painful. (AR 479-480). He indicated that he bought an
8 electric recliner to assist with getting up and down from a
9 sitting position. (AR 481). He was instructed to do very little
10 activity for one year following the surgery (i.e. not to mow the
11 lawn using even a self-propelled mower for one year following
12 surgery) and was not to lift anything heavier than a telephone
13 receiver two weeks after surgery. (AR 476, 481). Plaintiff
14 testified that, six months following surgery, he experienced
15 shortness of breath with exertion, such as getting out of a chair.
16 (AR 481-482). At that time, he could stand about five minutes at
17 a time and had no problem with sitting, but getting up or down
18 from the sitting position was difficult. (AR 483). He was
19 allowed to lift up to 20 pounds six months following surgery. (AR
20 483). Six months following surgery, his pain while sitting still
21 was at a level of three, on a scale of one to 10, and up to an
22 eight if he had hiccups or laughed. (AR 494). Six months or a
23 year following surgery, he could walk about 300 feet before
24 needing to rest. (AR 482-483). He testified that, a year after
25 surgery, his pain level had pretty much stabilized at a level of
26 two to two and one-half out of 10. (AR 495).

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1 Plaintiff testified that since his surgery in June of 2000,
2 he has had ongoing problems with drowsiness. (AR 496). He
3 indicated that he spends most of his day in a recliner, napping
4 off and on throughout the day. (AR 496). He stated that he felt
5 "exhausted" and spent all but maybe an hour of the day in his
6 recliner. (AR 497). He has not gone an entire week without
7 needing to rest or nap since June of 2000. (AR 498).

8 As noted above, based on the undisputed erroneous credibility
9 determination by the ALJ in this case, the undersigned shall
10 credit Plaintiff's testimony as true as a matter of law. *Varney*,
11 859 F.2d at 1400.

12 **B. RFC**

13 Plaintiff next contends that the ALJ erred by failing to
14 accord appropriate weight to the opinions of Plaintiff's treating
15 physician when making his RFC determination in this case. (Ct.
16 Rec. 12). Plaintiff specifically claims that the ALJ erred by
17 improperly rejecting the opinions of Dr. Clode regarding
18 Plaintiff's psychological impairments and limitations stemming
19 therefrom. (Ct. Rec. 12). The Commissioner agrees that the
20 medical evidence needs to be further evaluated with regard to
21 Plaintiff's mental condition, but asserts that the ALJ properly
22 found that Plaintiff could perform light exertion work based on
23 the testimony of Dr. Craig and the state agency reviewing
24 physicians. (Ct. Rec. 20).

25 **1. Dr. Clode**

26 The courts distinguish among the opinions of three types of
27 physicians: treating physicians, physicians who examine but do not
28 treat the claimant (examining physicians) and those who neither

1 examine nor treat the claimant (nonexamining physicians). *Lester*
2 *v. Chater*, 81 F.3d 821, 839 (9th Cir. 1996). A treating
3 physician's opinion is given special weight because of her
4 familiarity with the claimant and the claimant's physical
5 condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir. 1989).
6 Thus, more weight is given to a treating physician than an
7 examining physician. *Lester*, 81 F.3d at 830. Correspondingly,
8 more weight is given to the opinions of treating and examining
9 physicians than to nonexamining physicians. The Ninth Circuit has
10 held that "[t]he opinion of a nonexamining physician cannot by
11 itself constitute substantial evidence that justifies the
12 rejection of the opinion of either an examining physician or a
13 treating physician." *Id.*

14 An ALJ's decision to reject the opinion of a treating or
15 examining physician, may be based, in part, on the testimony of a
16 nonexamining medical advisor. *Magallanes v. Bowen*, 881 F.2d 747,
17 751-55 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th
18 Cir. 1995); *Roberts v. Shalala*, 66 F.3d 179 (9th Cir. 1995).
19 However, the ALJ must also have other evidence to support the
20 decision such as laboratory test results, contrary reports from
21 examining physicians, and testimony from the claimant that was
22 inconsistent with the treating physician's opinion. *Magallanes*,
23 881 F.2d at 751-52; *Andrews*, 53 F.3d 1042-43. "An ALJ may reject
24 the testimony of an examining, but nontreating physician, in favor
25 of a nonexamining, nontreating physician when he gives specific,
26 legitimate reasons for doing so, and those reasons are supported
27 by substantial record evidence." *Roberts*, 66 F.3d at 184.

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1 The Commissioner agrees that the issue of Plaintiff's mental
2 impairments remains unresolved and additionally does not defend
3 the ALJ's decision to reject the opinions of Plaintiff's treating
4 physician, Dr. Clode. (Ct. Rec. 20). As indicated by the
5 Commissioner, although the ALJ acknowledged that Plaintiff's
6 depression and anxiety difficulties became significant after his
7 heart disease diagnosis and that his symptomatology had waxed and
8 waned since then, the ALJ did not analyze these mental impairments
9 or discuss limitations they may have caused. (Ct. Rec. 20, p. 7;
10 AR 31). The Commissioner thus agrees that the ALJ erred by
11 failing to assess or evaluate Plaintiff's mental impairments.

12 On June 28, 2004, Dr. Clode indicated that Plaintiff "still
13 has very significant depression and . . . is probably not
14 employable based on this." (AR 442). On August 16, 2004, Dr.
15 Clode explained that, since Plaintiff's June 2000 heart surgery,
16 Plaintiff's "depression and anxiety . . . [have] rendered him
17 incapable of gainful employment." (AR 453). Dr. Clode indicated
18 that Plaintiff's major limiting factor following heart surgery was
19 psychiatric and that his depression and anxiety were overwhelming
20 to him. (AR 453). Dr. Clode stated that, since Plaintiff's
21 depression and anxiety were overwhelming to him, discussions about
22 Plaintiff's physical abilities were irrelevant. (AR 453). Dr.
23 Clode opined that Plaintiff's depression made him incapable of
24 productive employment following his heart surgery as he was
25 chronically anxious, poorly focused and unable to attend to detail
26 in a way that would allow him to be in the work force. (AR 456).

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1 Dr. Clode, Plaintiff's long-time treating physician, treated
2 Plaintiff for more than 25 years. (AR 450). As noted above, a
3 treating physician's opinion is given special weight because of
4 his familiarity with the claimant and the claimant's physical
5 condition. *Fair*, 885 F.2d at 604-05. A regular, treating
6 physician is in the best position to assess an individual's level
7 of functioning. In order to reject the opinions of treating
8 physician, the ALJ is required to give specific, legitimate
9 reasons which are supported by substantial record evidence.
10 *Roberts*, 66 F.3d at 184.

11 As noted by Plaintiff, the ALJ offered flawed and improper
12 rationale for rejecting Dr. Clode's treating opinions in this
13 case. (Ct. Rec. 12). The ALJ noted that Dr. Clode's opinion was
14 not supported by his "treating notes, with clear indications of no
15 cardiological symptoms, and that the claimant was doing well."
16 (AR 32). However, as noted by Plaintiff, Dr. Clode's opined that
17 Plaintiff's major limiting factor was psychiatric, not cardiologic
18 or otherwise related to physical symptoms. (Ct. Rec. 12, p. 24;
19 AR 453). Dr. Clode's records repeatedly show that Plaintiff was
20 experiencing significant problems with depression and other
21 related impairments, and the ALJ provides no other treating or
22 examining source to contradict Dr. Clode's treating opinion.
23 Since there is no evidence of record contrary to Dr. Clode's
24 opinions, the Commissioner, understandably, does not defend the
25 ALJ's basis for rejecting Dr. Clode's opinions. (Ct. Rec. 20).

26 Moreover, in making his RFC and ultimate disability
27 determination, the ALJ relied on the opinion of the medical
28 expert, Dr. Craig. It is apparent that Dr. Craig did not evaluate

1 the mental aspects of Plaintiff's claim. (AR 466, 469). Dr.
2 Craig based his opinions on what the ordinary person could do with
3 the diagnosed physical impairments and not what this particular
4 plaintiff could do. (AR 470-471). Accordingly, it is clear that
5 the ALJ erroneously based his determination on the opinions of Dr.
6 Craig, a physician who has never treated or examined Plaintiff, on
7 the physical limitation factors only.

8 Based on the foregoing, the undersigned finds that the ALJ's
9 rejection of Dr. Clode's opinions was erroneous, and the ALJ's
10 ultimate RFC determination is not based on substantial record
11 evidence. The ALJ improperly rejected the findings of Dr. Clode.
12 When the Commissioner fails to provide adequate reasons for
13 rejecting the opinion of a treating or examining physician, that
14 physician's opinion is credited as a matter of law. *Lester v.*
15 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995). Accordingly, the
16 undersigned credits Dr. Clode's opinions as a matter of law in
17 this case.

18 **2. Vocational Expert Testimony**

19 Since the undersigned judicial officer finds that the above
20 opinions of Dr. Clode regarding Plaintiff's limitations are
21 credited, the testimony of Debra LaPoint, the vocational expert,
22 regarding those limitations is also accepted. At the
23 administrative hearing held on September 17, 2004, Ms. LaPoint,
24 testified on cross-examination that an individual with the same
25 age, education, work experience and physical limitations
26 identified in the ALJ's hypothetical, with the additional mental

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1 limitations identified by Dr. Clode, would not be able to perform
2 Plaintiff's past work or any other work on a reasonably continuous
3 basis "per Dr. Clode's comments." (AR 512-514).

4 Plaintiff's testimony, the opinions of Dr. Clode and the
5 testimony of Ms. LaPoint demonstrate that Plaintiff would not be
6 able to perform his past relevant work or any other work given his
7 mental limitations. It is apparent from the record that there is
8 no job in the national economy that Plaintiff is capable of
9 working. Accordingly, the undersigned finds that further
10 development is not necessary for a proper determination to be made
11 in this case.

12 CONCLUSION

13 Plaintiff argues that the ALJ's errors should result in this
14 Court reversing the ALJ's decision and awarding benefits. (Ct.
15 Rec. 12). The Commissioner contends that the case should be
16 reversed and remanded for further administrative proceedings to
17 more thoroughly address the evidence. (Ct. Rec. 20). The Court
18 has the discretion to remand the case for additional evidence and
19 finding or to award benefits. *Smolen v. Chater*, 80 F.3d 1273,
20 1292 (9th Cir. 1996). The Court may award benefits if the record
21 is fully developed and further administrative proceedings would
22 serve no useful purpose. *Id.* Remand is appropriate when
23 additional administrative proceedings could remedy defects.
24 *Rodriguez v. Bowen*, 876 F.2d 759, 763 (9th Cir. 1989). In this
25 case, the record is adequate for a proper determination to be made
26 and further development is not necessary to remedy defects.

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1 Having reviewed the record and the ALJ's decision, this Court
2 finds that the ALJ erred by rejecting the testimony of Plaintiff
3 and the opinions of Dr. Clode. *Supra*. After crediting and taking
4 into consideration Plaintiff's testimony, the opinion of
5 Plaintiff's treating physician, and the vocational expert
6 testimony, the undersigned finds that the substantial weight of
7 the record reveals that Plaintiff is not capable of performing
8 sustained work activity. The ALJ's determination that Plaintiff
9 can perform his past work is not supported by substantial evidence
10 in the record and was not based upon the proper legal standards.
11 When Plaintiff's testimony and Dr. Clode's opinions are properly
12 credited, the evidence supports an immediate award of benefits.
13 Accordingly,

14 **IT IS ORDERED:**

15 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 11**) is
16 **GRANTED** and the case is **REMANDED** for an immediate award of
17 benefits.

18 2. Defendant's Motion to Remand (**Ct. Rec. 19**) is **DENIED**.

19 3. Judgment shall be entered for **PLAINTIFF**. An application
20 for attorney fees may be filed by separate motion.

21 4. The District Court Executive is directed to enter this
22 Order, provide a copy to counsel for Plaintiff and Defendant, and
23 **CLOSE** the file.

24 **DATED** this 11th day of August, 2006.

25
26 s/Michael W. Leavitt
MICHAEL W. LEAVITT
27 UNITED STATES MAGISTRATE JUDGE
28